In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-61

VESKA S. P. HITCHEVA,

Petitioner,

v.

DIVISION OF STATE LANDS
(of the State of Oregon),
WILLIAM S. COX, Director,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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On Petition for a Writ of Certiorari to the Court Of Appeals of the State of Oregon[1]

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Petitioner's statement is accepted.

[1]The petition herein is incorrectly styled a petition for a writ to the Supreme Court of the State of Oregon. As petitioner herself points out (Petition, at 1-2), the Oregon supreme court merely denied discretionary review of the decision of the court of appeals in this case; and since the court of appeals is the highest State court which has ruled on the merits of the case, it is the judgment of that court which petitioner is really seeking to have reviewed, as petitioner recognizes in her prayer for the writ (Petition, at 1). See, *e.g., Faretta v. California*, 422 US 806, 812 (1975); *Callender v. Florida*, 380 US 519 (1965), 383 US 270 (1966).

JURISDICTION

Petitioner's statement is accepted.

QUESTIONS PRESENTED

Petitioner's statement is accepted.

STATUTES

Petitioner's statement is accepted.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of facts, but adds the following thereto.

After petitioner Hitcheva was denied the estate of Mitchell Chongorsky in 1966, pursuant to former ORS 111.070, she did not appeal that denial to any state or federal court.

A similarly situated person subsequently did appeal and did challenge the constitutionality of former ORS 111.070. As a result, that statute was declared unconstitutional in *Zschernig v. Miller,* 389 US 429 (1968), reversing 243 Or 567, 412 P2d 781, 415 P2d 15 (1966).

REASON FOR DENYING THE WRIT

Petitioner has failed to state substantial reasons why this Court should grant a writ of certiorari.

At pages 28-36 of her petition, petitioner has listed three reasons why this Court should hear this case. In capsule form, these reasons are: (1) foreign governments may be interested in the outcome; (2) a large

amount of money may be involved if an uncertain number of escheats throughout the United States could be counted; and (3) the rights of unknown persons may be involved.

Respondent submits that such recitals do not constitute concrete reasons for this Court to take jurisdiction of a case that the Supreme Court of Oregon declined to review below.

Each question presented is not based on the facts of the case presented to the Oregon court of appeals: each question presented is nothing more than a hypothetical question.

This is so because each question presented assumes that petitioner Veska P. Hitcheva is or was the rightful *owner* of the property which was once the estate of Michael Chongorsky.

This assumption cannot stand close scrutiny. Veska Hitcheva filed a claim to recover the estate of Michael Chongorsky; she was denied the right to recover the estate because the laws of Bulgaria (Chongorsky's homeland) did not allow United States citizens to recover estates in Bulgaria. (Former ORS 111.070). She *accepted* this decision and allowed the time for appeal to expire.

In doing so, she declined to "fight her own case" and accepted the status quo.

When someone else did fight, and did have ORS

111.070 declared unconstitutional, Veska Hitcheva came forward to again file a claim for the estate. Now she is in effect asking this Court to declare unconstitutional, as applied to her, the requirement of present ORS 116.253(2)(c) that a person petitioning for the recovery of escheated property had no knowledge of the escheat at the time it occurred.

She cannot be heard to say that the estate ever belonged to her: she accepted the fact that it did not. The fact that former ORS 111.070 was unconstitutional is now neither relevant nor material.

Petitioner did not challenge the constitutionality of ORS 116.253 below and does not directly challenge its constitutionality now. She can present nothing more to this Court as reasons why it should take jurisdiction other than an interesting dissertation on the history of unconstitutional escheat statutes. Respondent submits that such a dissertation is not adequate to invoke the jurisdiction of this Court.

Respondent does not overlook the fact that petitioner has an equitable argument; petitioner's counsel has ably and zealously urged a sympathetic result based on equity. The difficulty with this argument is that it is being made ten years too late to the appellate courts. Petitioner should have appealed instead of accepting the decision of the probate court ten years ago.

A similar case which arose in the State of California is instructive on this point.

In *Estate of Gogobashvele,* 195 Cal App 2d 503, 16 Cal Rptr 77 (1961), a case similar to the Oregon supreme court's decision in *Zschernig v. Miller, supra,* a California district court of appeal held that USSR citizens were barred from partaking in an estate. In 1966, however, the California supreme court specifically disapproved of the *Gogobashvele* decision in *Estate of Larkin,* 65 Cal 2d 60, 52 Cal Rptr 441, 416 P2d 473 (1966).

In the interim, certain claimants to the estate of one John Horman had allowed the five-year statute of limitations on claiming the estate to run. They thereafter came forth, contending that the statute of limitations should not apply in their case, since their claims to the estate would have been barred by the decision in *Gogobashvele* during the five years in question. The California supreme court rejected this contention, noting that the claimants had not been prevented in any manner from filing their claim and challenging the soundness of the reasoning in *Gogobashvele,* as, indeed, the claimants in *Larkin* had done; and this Court denied claimants' petition for certiorari. *Estate of Horman,* 5 Cal 3d 62, 71-72, 95 Cal Rptr 433, 439-440, 485 P2d 785, 791-792 (1971),

cert. denied sub nom. Gumen v. California, 404 US 1015 (1972).

Respondent submits that the situation in the case at bar is comparable to the sequence of events in California and that there is no more reason to grant certiorari in this case than there was in *Gumen.*

Here petitioner did not challenge the probate court's escheat order in the appellate courts. Later, when someone else did challenge the law which the probate court relied on (former ORS 111.070, 120.130), that law was found to be unconstitutional. Under the maxim that one must fight his own case, as adopted by the California supreme court under circumstances similar to those in the case at bar, respondent submits that the petition for certiorari in this case should be denied.

CONCLUSION

For the above reasons, the petition for certiorari should be denied.

Respectfully submitted,

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October, 1978